STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE C. HARRIS,

Defendant-Appellant.

UNPUBLISHED
May 11, 2001

No. 220547
Wayne Circuit Court
LC No. 98-008681

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2).[1] He was sentenced to fifteen to thirty years' imprisonment for the second-degree murder conviction, the sentence to be served consecutively to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arose out of the shooting death of Larry Dowdell, Sr., which occurred at the end of Alter Road, near the Detroit River, in the City of Detroit, while Dowdell was fishing with his son, Larry Dowdell, Jr. ("Junior"), and stepson, William Mosley. This shooting occurred on the morning of June 30, 1998, six days after the city of Detroit's fireworks display, which defendant's son had watched with Mosley, Mosley's mother, and Dowdell. While watching the fireworks at the end of Alter Road, Dowdell apparently grabbed defendant's son by the neck because he continually leaned over a bar, despite warnings from Mosley's mother to stop.[2] According to Mosley, defendant's son was upset as a result of Dowdell grabbing him by the neck.

[1] Defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a); however, after hearing testimony, the trial court concluded that the prosecutor had failed to establish the elements of first-degree murder.

[2] Apparently, this bar was a barricade designed to prevent people from falling into the Detroit River.

After the police arrived at the scene, Mosley and Junior informed the officers that defendant was the shooter and that he drove a van.[3] They then directed the officers to defendant's home. On arrival at defendant's home, the officers noticed that defendant was outside, working on his house. Once more police arrived, the officers got out of their cars, pulled their guns, and arrested defendant. Following defendant's arrest, defendant was questioned by Officer Monica Childs of the Detroit Police Department. Childs testified that she spoke to defendant at 3:00 or 3:30 p.m. on June 30, 1998 and that she informed defendant of his *Miranda*[4] rights before questioning.

After being informed of his *Miranda* rights, defendant chose to voluntarily answer questions put to him by Childs as Childs used a statement form in the questioning. Defendant answered her first nine questions without incident. However, after initially answering question ten, defendant placed his hands over the statement form and asked Childs not to write down the response because it wasn't the truth. Childs complied with this request and did not record defendant's answer to question ten. Childs then asked defendant two more questions, which he did not respond to. After these two questions, defendant informed Childs that he did not wish to answer anymore questions and also indicated that he wanted an attorney. Childs then wrote in the space for the answer to question ten that defendant exercised his right to remain silent and to request an attorney. Childs then signed the form and offered it to defendant, who refused to sign. After defendant was taken to another floor, Child's wrote defendant's response to question ten in her notes.

At trial, Mosley, testified that he observed defendant come out of the bushes near the area where Dowdell was fishing, approach Dowdell, and shoot him once in the head. In addition, Mosley, Junior, Joseph Ponder, and Michael Hart,[5] all testified that, after the shooting, they observed defendant run to a van, get inside, back up and drive away. Pictures of this van were identified at trial by Mosley, Junior and Hart. The court acquitted defendant of first-degree murder, but found him guilty of second-degree murder and felony-firearm. On appeal, defendant challenges his convictions on the grounds that the trial court improperly admitted statements he made to the police, that there was insufficient evidence to find him guilty of the crimes beyond a reasonable doubt, and that his constitutional rights were violated when he was denied the opportunity to call witnesses at his preliminary examination.

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[3] According to the officers testimony, Mosley and Junior informed them that defendant drove a blue van with a silver stripe; however, at trial, both Mosley and Junior denied telling the officers that they had seen a blue van with a silver stripe that morning.

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[5] Ponder and Hart were gentlemen who were also fishing at the end of Alter Road at the time of the shooting. Ponder called "911" after hearing a pop and hearing someone say Dowdell had been shot. Hart also testified that he heard a "pow" and saw a man walk out from behind the lighthouse.

I

Defendant first argues that the lower court erred by denying his motion to suppress certain statements he made to the police. This Court reviews a trial court findings of fact regarding a motion to suppress evidence for clear error and reviews the trial court's ultimate decision on a motion to suppress de novo. *People v Williams*, 240 Mich App 316, 318; 614 NW2d 647 (2000); *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999); See also MCR 2.613(C). Clear error exists where we are left with a definite and firm conviction that a mistake has been made. *People v Manning*, 243 Mich App 615, 620; ___ NW2d ___ (2000); *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Defendant contends that his act of placing his hand over the statement form and telling Childs, "don't write that," constituted an assertion of his Fifth Amendment right to remain silent and therefore a revoked his previous waiver of that right.[6] We disagree. When an accused validly waives his Fifth Amendment rights, police officers may continue questioning him until and unless he unambiguously requests an attorney. *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). In addition, if an ambiguous request for an attorney is made, the police are not required to cease questioning or to clarify whether a suspect wishes to consult with counsel. *Id*. However, once a defendant invokes his right to counsel, all interrogation must cease until the defendant is appointed an attorney, unless the defendant himself initiates further communication. *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *People v Kowalski*,230 Mich App 464, 478; 584 NW2d 613 (1998).

In *People v McReavy*, 436 Mich 197, 219-220; 462 NW2d 1 (1990), our Supreme Court held that the defendant's conduct and silence after waiving his right to remain silent did not constitute an assertion of that right, and the admission of testimony concerning the defendant's conduct did not violate his constitutional rights. There, the defendant waived his right to remain silent, but after doing so, refused to respond to direct questions and instead put his head in his hands and looked down. *Id*. at 205. Similarly, in *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999), the defendant waived his *Miranda* rights and answered questions posed by police officers, but then he stopped talking and hung his head down before answering further questions. *Id*. at 437. In a second interview, the defendant again waived his *Miranda* rights, but merely looked down, nodded his head, and cried. *Id*. This Court held that the police officers' testimony concerning the defendant's subsequent nonverbal conduct and silence was not improper because the defendant's conduct and silence did not constitute an invocation of his right to remain silent. *Id*. at 436-437.

Here, defendant answered the first nine questions asked of him; then, after answering question number ten, defendant placed his hand on the statement form and asked Childs not to write his response on the form. He then refused to answer two more questions. It was only after

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[6] Defendant has not challenged his initial waiver of *Miranda* rights as not being voluntary, knowing, or intelligently made. Therefore, we need not conduct a review of defendant's initial waiver in this case. Instead, we simply must decide at what point, if at all, defendant revoked that waiver.

these refusals that defendant verbally and unambiguously invoked his Fifth Amendment right by requesting an attorney. Consequently, Childs was not required to discontinue the interview until that point, which she did. *Edwards, supra*; *Kowalski, supra*; *Granderson, supra* at 677-678. Therefore, because conduct and silence does not constitute an assertion of the right to remain silent, the lower court did not err by admitting defendant's statements in response to question number ten at trial. *McReavy, supra* at 219-220; *Rice, supra*.[7]

II

Defendant next argues that there was insufficient evidence to support his convictions. Specifically, defendant argues that his convictions were based on the uncorroborated testimony of Mosley. Again, we disagree. Generally, we review de novo a challenge to the sufficiency of the evidence in a bench trial. The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000); *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW 2d 802 (1999). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the crime, *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998), and because proving a defendant's state of mind is difficult, minimal circumstantial evidence is sufficient, *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

To establish second-degree murder, a prosecutor must prove that the defendant caused the victim's death and that the killing was done with malice and without justification or excuse. *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). Malice has been held to be the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with the knowledge that such harm or death will probably result. *Id*. Malice may be inferred from the facts and surrounding circumstances. *Id*.

Mosley testified that he witnessed the shooting and knew defendant was the shooter because he could see defendant's face once defendant emerged from the bushes. Mosley also identified pictures of defendant's van at trial, noting that he had previously seen defendant inside the van and had seen the van at defendant's house. In addition, contrary to defendant's argument, the testimonies of defendant's wife, Junior, Hart, Ponder and Childs, all corroborated different parts of Mosley's testimony. The trial court stated that it found Mosley's testimony to be very credible and believable. This Court will not substitute its judgment regarding witness credibility for that of a trial court, which is in a better position to judge credibility of the witnesses. *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993).

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[7] Defendant also argues that his statements should have been suppressed because Childs failed to make an audio or video recording of defendant's statement to police. Defendant acknowledges that, in *People v Fike*, 228 Mich App 178, 186; 577 NW2d 903 (1998), this Court expressly declined to require police officers to make audio or video recordings of custodial interrogations. We are bound by this prior decision, MCR 7.215 (C)(2), and see no reason to revisit the issue at this time, in this case.

Further, defendant admitted in his statement to police that he had asked Mosley where his mother lived and whether she lived with "the guy", referring to Dowdell, that was accused of hitting and choking his son. Defendant also told Childs that he was at home the entire morning until the police came and got him, but then told her not to write down his response because it was not true. This circumstantial evidence established malice on the part of defendant, *Mayhew*, *supra*; *Crawford, supra*; *McRunels, supra*, and also established his opportunity to commit the crime. Accordingly, the prosecutor proved beyond a reasonable doubt that defendant caused Dowdell's death, that the shooting was committed with malice, and that the shooting was without justification or excuse; thus, there was sufficient evidence to support defendant's convictions beyond a reasonable doubt. *Sherman-Huffman*, *supra*; *Ortiz-Kehoe*, *supra*; *Crawford*, *supra*; *McRunels*.

III

Defendant also argues that he was denied his constitutional rights when the magistrate refused to allow him to call witnesses at his preliminary examination and when the trial court denied his motion to remand the case to the district court for the purpose of continuing the examination. Whether a magistrate's refusal to allow a defendant to present witnesses at a preliminary examination deprives a defendant of his constitutional rights is a question of law. We review questions of law, as well as constitutional issues, de novo. *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000); *People v Levandoski*, 237 Mich App 612, 617; 603 NW2d 831 (1999). The purpose of a preliminary examination is to determine whether a crime has been committed and if probable cause exists to believe that the defendant committed it. *People v Laws*, 218 Mich App 447, 451-452; 554 NW2d 586 (1996); See also MCL 766.13; MSA 28.931. A magistrate may weigh the credibility of witnesses, but where the evidence conflicts or raises a reasonable doubt as to whether the defendant committed the offense charged, the defendant should be bound over and the factual questions resolved by the trier of fact. *People v Carlin (On Remand)*, 239 Mich App 49, 64; 607 NW2d 733 (1999); *People v Northey*, 231 Mich App 568, 575; 591 NW2d 227 (1998); *Laws*, *supra* at 452. In addition, a defendant's right to a preliminary examination is statutory, not constitutional. *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993); *People v Fortson*, 202 Mich App 13, 15; 507 NW2d 763 (1993); See also MCL 766.13; MSA 28.931.

Defendant contends that he was denied his constitutional right to present witnesses at his preliminary examination and relies on MCL 766.12; MSA 28.930, in support of his argument. However, since a defendant's right to a preliminary examination is not constitutional, MCL 766.13; MSA 28.931; *Fortson, supra* at 15, it follows that there is no constitutional right to present witnesses at a preliminary examination; accordingly, defendant was not deprived of a constitutional right to present witnesses at his preliminary examination. Further, the magistrate heard Mosley's testimony identifying defendant as the shooter and determined that the testimony was credible. Thus, any witnesses defendant wished to call would have, at best, simply created conflicting accounts as to what occurred. Where evidence conflicts, a defendant should be bound over for trial and the factual issues resolved by the trier of fact. *Carlin, supra* at 64; *Northey, supra* at 575; *Laws, supra* at 452. Therefore, even if the magistrate had allowed defendant to call his witnesses, the magistrate nevertheless would have been obligated to bind defendant over for trial. Consequently, even if the magistrate erred by denying defendant's request to call witnesses

to testify at defendant's preliminary examination, and even if the lower court erred by denying defendant's motion to remand, these errors were harmless beyond a reasonable doubt. See *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder